RECENT CASES

Constitutional Law—Carriers—Power of the Interstate Commerce Commission To Impose Dismissal Wage Provisions as a Condition to Approving a Lease—[Federal].—Trustees of a railroad in reorganization applied to the Interstate Commerce Commission under Section 5(4)(b) of the Interstate Commerce Act[1] for authority to lease another railroad.[2] The commission found[3] that combined operation of the two lines, resulting in elimination of the accounting office of the lessor, would save $100,000 annually, to be effected by the dismissal of forty-nine employees and the transfer of twenty others. Holding that the welfare of employees affected was a matter of public interest, the commission authorized the lease on the condition that retained employees be compensated for reductions of salary due to lost seniority rights; that dismissed employees be paid partial compensation for periods depending upon terms of service; and that transferred employees be reimbursed for moving expenses, including losses incurred because of forced sale of real estate.[4] Cost of compliance was estimated at a maximum of $290,000 over a five-year period. In a suit brought by the trustees in district court, the commission's order as it related to the conditions precedent was set aside and an injunction granted.[5] On appeal to the Supreme Court by the commission, *held*, the conditions for the protection of employees were reasonable, and promoted the public interest by facilitating railroad consolidation; Section 5(4)(b) as construed by the commission is not unconstitutional on the ground that it is not within the Congressional power to regulate commerce; imposition of conditions precedent to the exercise by the railroad of the privilege relieving it of certain carrier duties is not a denial of due process. Judgment reversed. *United States v. Lowden.*[6]

Section 5(4)(b) of the Interstate Commerce Act prescribes two standards to guide the commission's determination that a railroad consolidation or lease may be authorized. The consolidation or lease must be in harmony with the commission's general consolidation plan,[7] and must promote the public interest. The Supreme Court has repeatedly held that the phrase "public interest" as used in Section 5 does not refer generally to matters of public concern apart from the public concern in an adequate, efficient and economical transportation system.[8] In withholding its order approving

[1] 48 Stat. 217 (1933), 49 U.S.C.A. § 5(4)(b) (Supp. 1939).

[2] All the capital stock of the prospective lessor was owned by the prospective lessee.

[3] Chicago, R.I. & P. R. Co. Trustees Lease, 230 ICC 181 (1938) and 233 ICC 21 (1939).

[4] Similar conditions were imposed in the authorization of a merger of railroad properties. Louisiana & A. R. Co. Merger, 230 ICC 156 (1938).

[5] Lowden v. United States, 29 F. Supp. 9 (C.C.A. 7th 1939). [6] 60 S. Ct. 248 (1939).

[7] Consolidation of Railroads, 159 ICC 522 (1929) and 185 ICC 403 (1932). The commission's consolidation plan assigned the properties of both railroads involved in the principal case to System No. 19.

[8] New York Central Securities Co. v. United States, 287 U.S. 12 (1932); New England Divisions Case, 261 U.S. 184 (1923); Dayton-Goose Creek R. Co. v. United States, 263 U.S. 456 (1924); Texas & P. R. Co. v. Gulf, C. & S. F. R. Co., 270 U.S. 266 (1926); Texas v. United States, 292 U.S. 522 (1934).

the lease in the present case, the Interstate Commerce Commission found that Section 5 was broad enough to comprehend the interests of rail employees involved in changes of operations.[9] The trustees for the railroad maintained that a carrier's employees, as such, are not part of the public, and that their interest in preserving their jobs is a private one and not an interest which the statute sought to protect.[10] The Supreme Court said[11] that the policy of consolidation adopted by Congress is intimately related to the maintenance of an efficient rail system; and that the public interest in one cannot be dissociated from the other. Unification is effected principally at the expense of labor,[12] and therefore steps taken in carrying out the consolidation policy will "subject railroad labor relations to serious stress."[13] The consequences may so affect employee morale,[14] the Court concluded, as to require mitigation in the interest of consolidation and the efficiency of the industry, both of which are of "public concern" within the meaning of Section 5(4)(b).[15]

In putting forward its argument that acceptance of the commission's view of "public interest" would make that standard "too general and ambiguous to serve as a prescribed standard for the delegation of legislative power,"[16] the railroad also contended that the words "terms and conditions as it [the commission] shall find just and reasonable" in Section 5 gave that agency neither an independent standard nor added to the powers specifically prescribed. In forwarding the report of the Federal Coordinator of Transportation to Congress in 1935,[17] the commission suggested that the power to order dismissal compensation was not within its jurisdiction. Separate dissents in the two reports[18] in the present case were based upon the impropriety of ad-

[9] St. Paul B. & T. R. Co. Control, 199 ICC 588 (1934); Erie and Pere Marquette Control, 138 ICC 517 (1928).

[10] Brief for appellee at 17–18, United States v. Lowden, 60 S. Ct. 248 (1939).

[11] United States v. Lowden, 60 S. Ct. 248, 252 (1939).

[12] The Interstate Commerce Commission has estimated that seventy-five per cent of the savings will be through the reduction of labor costs. Consolidation of Railroads, 159 ICC 522 (1929). Securities holders are usually, although not always, favorably affected by economies effect by consolidations, St. Louis Southwestern R. Co. Control, 180 ICC 175 (1932). But see Nickel Plate Unification, 105 ICC 425 (1926) (consolidation disapproved because plan failed to deal fairly with minority stockholders).

[13] Strikes have been threatened on several occasions because of consolidations, 28 Monthly Lab. Rev. 1191 (1929) (Emergency Railway Labor Board awarded compensation for losses caused by depreciation of real estate); 43 Monthly Lab. Rev. 867 (1936) (dismissal compensation agreed upon between management and workers).

[14] Report of the Committee of Six to the President (December 23, 1938).

[15] The Court here relied upon the report of Committee of Six (note 14 supra), three of whom were railroad executives, prior reports of the Interstate Commerce Commission (H.R. Doc. 394, 74th Cong. 2d Sess., at 56 (1936)), the history of rail legislation (notes 27–33 infra), and legislation now before Congress (note 19 infra), all dealing with the protection of rail labor.

[16] Brief for appellee, at 18–20, United States v. Lowden, 60 S. Ct. 248 (1939). Admittedly the standard "public interest" in the Interstate Commerce Act is broad; Congress probably so intended it. Cf. FTC v. Gratz, 253 U.S. 421 (1920); 7 Univ. Chi. L. Rev. 153, n. 20 (1939).

[17] H.R. Doc. 89, 74th Cong. 1st Sess., at vi (1935).

[18] Chicago, R.I. & G. R. Co. Trustees Lease, 230 ICC 181, 190 (1938) and 233 ICC 21 (1939).

ministrative construction in the matter. It is true, also, that legislation has been before Congress for nearly four years which, if approved, will direct the commission to require protection of the interests of the employees affected in a consolidation.[19] Bills containing such a provision have passed both houses of Congress and are in conference. The Senate bill contains a proviso which, if strictly construed, would mean the "freezing" of rail employment, thereby virtually blocking further consolidation.[20] The Supreme Court, noting this legislation in the present case, concluded that "the only effect of this . . . . was to give legislative emphasis to a policy . . . . already recognized by § 5(4)(b) by making the practice mandatory instead of discretionary."[21]

The appellees in the principal case also contended that payment of money to *former* employees had no relation to interstate commerce and that the imposition of such conditions was without authority of law.[22] In *Railroad Retirement Board v. Alton R. Co.*[23] the Supreme Court held invalid the Railroad Retirement Act of 1934,[24] which required carriers to contribute to a fund for the payment of annuities to retired employees. The majority, speaking through Mr. Justice Roberts, said that legislation for the "purpose of fostering . . . . a contented mind on the part of an employee" was in no sense a regulation of interstate commerce and was "outside the orbit of Congressional power."[25] Chief Justice Hughes, with whom three justices concurred, dissented sharply: "It is not our province to enter that field [setting up a pension plan], and I am not persuaded that Congress . . . . has transcended the limits of the authority which the Constitution confers."[26]

The *Alton* case stands almost alone in denying the power of Congress to legislate regarding rail labor. Successive measures have provided for safety appliances,[27] the

[19] S. 2009, 76th Cong. 1st Sess. (1939); H.R. 1217, 76th Cong. 1st Sess. (1939).

[20] Section 8 of the Senate bill, amending Section 5 of the Interstate Commerce Act, reads as follows: "The Commission shall require, as a prerequisite to its approval of any proposed transaction . . . . , a fair and equitable arrangement to protect the interests of the employees affected: Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees . . . . , or in the impairment of existing employment rights. . . . ." S. 2009, 76th Cong. 1st Sess. 211 (1939). A similar provision was contained in the Emergency Railroad Act of 1933 (48 Stat. 214 (1933), 45 U.S.C.A. § 257 (Supp. 1939)), which was in force until June 17, 1936. 34 Time, No. 25, 74 (December 18, 1939). "To rail labor, Congressionally represented by shrewd Senator Burt Wheeler, is conceded Washington's No. 1 lobby. Notorious is its ability to send bills crashing through in the last few days of a session; formidable is its veto of any bill to reduce the number of rail jobs. . . . ." For a discussion of special legislation on behalf of rail management, see Will, Chapter XV of the Bankruptcy Act—An American Adaptation of the Fait Accompli, 7 Univ. Chi. L. Rev. 203 (1940).

[21] United States v. Lowden, 60 S. Ct. 248, 255 (1939). The holding suggests a reappraisal of the powers of administrative bodies to construe statutes. Such a discussion will appear in a later issue.

[22] Brief for appellee, 25–7, United States v. Lowden, 60 St. Ct. 248 (1939).

[23] 295 U.S. 330 (1935).

[24] 48 Stat. 1283 (1934), 45 U.S.C.A. § 201 (Supp. 1935).

[25] Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 368 (1935).

[26] Ibid., at 391.

[27] Safety Appliance Act of 1893, 27 Stat. 531 (1893), 45 U.S.C.A. § 1 (1928); Southern R. Co. v. United States, 222 U.S. 20 (1911).

arbitration of disputes between management and workers,[28] hours of service,[29] liability for injuries and death suffered by employees,[30] fixing wages,[31] and unemployment insurance.[32] In 1937 a new railroad retirement act was passed by Congress,[33] the constitutionality of which has not yet been questioned before the Supreme Court. The opinion in the instant case further relegates the *Alton* case to a line of authority, which, while never specifically overruled, will not be followed by the present Court. In speaking for a unanimous court, Mr. Justice Stone referred to the *Alton* case thus: "Notwithstanding what was said there and even if we were doubtful whether the particular provision made here . . . . could have the effect which we have indicated upon railroad consolidation and upon the adequacy and efficiency of the railroad transportation system, we would not say that the Congressional judgment[34] that those conditions have a relation to the public interest . . . . is without a rational basis."[35]

Likewise, the Court paid scant attention to the holding in the *Alton* case, relied upon by appellees, that the compulsory payment of money by carriers into a fund to be distributed to former employees was taking of property without due process of law.[36] In *Dayton-Goose Creek R. Co. v. United States*[37] the Court held that the Fifth Amendment did not forbid the compulsory application of part of a railroad's "excess" income to a fund maintained by the commission for the benefit of weaker railroads.[38]

[28] Railway Labor Act of 1926, 44 Stat. 577 (1926) as amended 49 Stat. 1189 (1934), 45 U.S.C.A. § 151 (Supp. 1939); Texas & N.O. R. Co. v. Brotherhood of R. and Steamship Clerks, 281 U.S. 548 (1930); Virginian R. Co. v. System Federation No. 40, 300 U.S. 515 (1937).

[29] Hours of Service Act of 1907, 34 Stat. 1415 (1907), 45 U.S.C.A. § 61 (1928); Baltimore & O. R. Co. v. ICC, 221 U.S. 612 (1911).

[30] Federal Employers' Liability Act of 1908, 35 Stat. 65 (1908), 45 U.S.C.A. § 51 (1928); Second Employers' Liability Cases, 223 U.S. 1 (1912). The first federal Employers' Liability Act was held unconstitutional, Employers' Liability Cases, 207 U.S. 463 (1908).

[31] Adamson Act of 1916, 39 Stat. 721 (1916), 45 U.S.C.A. § 65 (1928); Wilson v. New, 243 U.S. 332 (1917).

[32] Railroad Unemployment Insurance Act of 1938, 52 Stat. 1094 (1938) as amended 53 Stat. 845 (1939), 45 U.S.C.A. § 351 (Supp. 1939).

[33] Railroad Retirement Act of 1937, 50 Stat. 307 (1937), 45 U.S.C.A. § 228a (Supp. 1939). This legislation was before the Supreme Court in California v. Latimer, 305 U.S. 255 (1938), but the question of constitutionality apparently was not raised.

[34] The phrase "Congressional judgment" seems to be ambiguous. If the Court was referring to the legislation now before Congress, it must be remembered that the bills have not yet become law. If the Court was referring to other railroad legislation (notes 31–7 supra), these acts were not controlling on the point the Court was deciding.

[35] United States v. Lowden, 60 S. Ct. 248, 255 (1939). In support of this conclusion Mr. Justice Stone cited three recent cases (South Carolina Highway Dept. v. Barnwell Bros., 303 U.S. 177, 191 (1938); United States v. Carolene Products Co., 304 U.S. 144, 147 (1938); Pitman v. HOLC, 60 S. Ct. 15 (1939) showing the tendency of the present Court not to inquire into the reasonableness and propriety of legislative action which might have been seriously questioned under former opinions of the Court.

[36] United States v. Lowden, 60 S. Ct. 248, 255 (1939).

[37] 263 U.S. 456 (1924).

[38] There are the so-called recapture provisions of the Transportation Act of 1920. 41 Stat. 488 (1920), 49 U.S.C.A. § 15(a) (1929).

The basis of that decision was that since the stronger roads have no constitutional right to receive more than a fair return, and since they would receive more than a fair return under uniform rates set to provide the weaker roads with a fair return, it was competent for Congress to declare that half of the income above a fair return should be held in trust, and to appropriate it to serve the public interest. In the principal case the Court reasoned that the privilege of a consolidation lease was like the privilege of receiving more than a fair return, and that the order conditioning award of the privilege upon payment of dismissal compensation did not infringe substantive due process.

Corporations—Laches and Acquiescence as a Bar to Relief of Minority Stockholder from Destruction of His Rights to Arrearages on Preferred Stock—[Delaware].—A Delaware corporation, pursuant to the requisite vote of its stockholders, purported to amend its charter to provide for the conversion of each share of its preferred stock, on which there were accrued arrearages of $21.25 per share, into five shares of common stock. The exchange was to be effected without discharge of the unpaid dividends on the preferred. A dissenting stockholder sought and obtained a judgment that the amendment did not foreclose his rights to accrued dividends.[1] After learning of a compromise and preparation for dismissal of this suit, the plaintiff, who had caused his stock to be voted against the amendment, attempted to intervene and to be substituted as party plaintiff. When his motion to intervene was denied without prejudice,[2] the plaintiff brought a separate action. The corporation defended on the ground that the plaintiff was barred by laches and acquiescence in that he had delayed institution of the action, and had accepted dividends after consummation of the purported amendment of the charter. The dividends were on the common shares which the plaintiff had refused to accept in exchange for his preferred stock. The court sustained the defendant's plea, and dismissed the suit. *Frank v. Wilson & Co.*[3]

Although many rights of dissenting stockholders have been held subject to destruction by charter amendment,[4] the courts have frowned upon the elimination of accrued cumulative dividend arrearages.[5] When attempted elimination of arrearages is held to

[1] Keller v. Wilson & Co., 190 Atl. 115 (Del. 1936).

[2] Keller v. Wilson & Co., 194 Atl. 45 (Del. Ch. 1937). The court pointed out that the plaintiff's bill was drawn to permit intervention by all parties in the same position as the plaintiff, but that the intervenor was not in the plaintiff's position.

[3] 9 A. (2d) 82 (Del. Ch. 1939). [4] 7 Fletcher, Cyc. Corp. §§ 3695–3698 (perm. ed. 1931).

[5] Keller v. Wilson & Co., 190 Atl. 115 (Del. 1936); Johnson v. Consolidated Film Industries, 197 Atl. 489 (Del. 1937). That the Wilson & Co. charter amendment and others like it were invalid as to dissenting stockholders was established in Keller v. Wilson & Co., 190 Atl. 115 (Del. 1936), and similar plans were abandoned by other corporations contemplating the elimination of arrearages on preferred stock. 28 Time, No. 21 at 85 (November 23, 1936).

For a general discussion of plans for scaling down arrearages on cumulative preferred stock see SEC, Report on the Study and Investigation of the Work, Activities, Personnel, and Functions of Protective and Reorganization Committees, pt. VII, § III (1938); and notes in 4 Univ. Chi. L. Rev. 645 (1937), 46 Yale L. J. 620 (1937), and 6 Univ. Chi. L. Rev. 104 (1938). A treatment of the development of Delaware law and statutes as related to the Keller case may be found in 4 Univ. Chi. L. Rev. 139 (1936) and 35 Mich. L. Rev. 620 (1937). A discussion of the rights of assenting stockholders in the Keller v. Wilson & Co. situation may be found in 31 Ill. L. Rev. 1092 (1937).